

DECISION



17824
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-198818

DATE: April 21, 1981

MATTER OF: Dependency Determination for

[Rate of Basic Allowance for Quarters *Payable in Dependency Situations*

- DIGEST: 1. Where two Air Force members married to each other with one child are divorced, the male member paying child support and the female member having custody of the child, the child is the dependent of both members under 37 U.S.C. 401; however, since only one member may receive basic allowance for quarters (BAQ) based on the child as a dependent, only the member paying child support (in this case the male member) receives BAQ at the with dependent rate.
2. Where two Air Force members married to each other with one child are divorced, the male member paying child support and the female member having custody of the child, the male member is entitled to receive basic allowance for quarters (BAQ) at with dependent rate. However, if the member receiving the increased BAQ does not claim the dependent child, the female member who has custody of the child may claim BAQ at the with dependent rate.
3. Where two Air Force members who are married to each other and who have one child are divorced with the male paying child support and the female having custody of the child, the male member receives increased basic allowance for quarters (BAQ) on account of the child, but the female member may claim increased BAQ on account of the child, if the male member declines to claim the child for BAQ purposes. When the male member acquires or has different dependents on which to base his claim for increased BAQ, it may

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be assumed (without a formal declination) that he is not claiming the common dependent for increased BAQ purposes.

4. A declination to claim a dependent for increased basic allowance for quarters purposes, should be in writing when possible but need not be and should not be considered irrevocable since as dependents change so should a member's ability to claim a dependent be changeable.

This action is in response to certain questions relating to the rate of Basic Allowance for Quarters (BAQ) payable to members of the uniformed services, either married or formerly married to each other, in various dependency situations.

The questions together with relevant facts were submitted by the Chief of Accounting and Finance, Comptroller, Headquarters Warner Robins Air Logistics Center, Robins Air Force Base. The request has been assigned Control Number DO-AF-1345 by the Department of Defense Military Pay and Allowance Committee.

Sergeant Martha A. Bedford, hereafter Ms. Bedford, was divorced from Staff Sergeant George C. Butts, hereafter Mr. Butts, in August 1978. Both members are on active duty in the Air Force. Custody of the one child of the marriage was awarded to Ms. Bedford and Mr. Butts was required to pay child support. As a result of these payments Mr. Butts has been receiving BAQ at the with dependent rate.

In September 1978, Ms. Bedford married Master Sergeant Claude V. Bedford, Jr. He is receiving BAQ at the with dependent rate on account of dependents of a prior marriage for whom he pays child support. Presumably Ms. Bedford is receiving BAQ at the without dependent rate.

Ms. Bedford is now claiming BAQ at the with dependent rate from January 1, 1980, on account of the child in her custody, since on that date Mr. Butts remarried another individual who is not a service member. Ms. Bedford contends that since Mr. Butts is now entitled to claim the

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increased allowance on the basis of his dependent wife, she should be entitled to the increased allowance on account of the child in her custody. She indicates that Mr. Butts will not decline to claim the child as his dependent.

In view of these facts the following questions are presented:

"a. Where a member, claiming BAQ on the basis of paying court ordered support for a dependent child in the custody of a former spouse who is also a service member, acquires an additional dependent through marriage, may the former spouse then claim the child for BAQ purposes, if otherwise proper?

"b. If the answer to 'a' is affirmative, must the member paying court-ordered support decline to continue claiming the child for BAQ purposes as a prerequisite to the member having custody claiming the child for BAQ purposes?

"c. If the answers to 'a' and 'b' are affirmative, what evidence of declination is required and under what circumstances, if any, may it be revoked?"

With regard to questions "b" and "c" it is noted in the submission that the Air Force is of the view that a declination should be in writing, irrevocable, and endorsed by the member's commanding officer.

Under the provisions of 37 U.S.C. 403 (1976), a member who is entitled to basic pay is entitled to BAQ unless he is provided with Government quarters adequate for himself and his dependents. There are two rates of BAQ, the with dependent rate and the without dependent rate, and this allowance is intended to at least partially reimburse a member for the expense of providing quarters for himself and his dependents. The term dependent as used in 37 U.S.C. 401 (1976), includes a member's spouse and child. However, members who are married to each other may not include each other as dependents for increased allowance purposes since 37 U.S.C. 420 (1976),

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prohibits the claiming of a dependent who is entitled to basic pay.

Under 37 U.S.C. 401, a child of members married to each other is considered the dependent of both members. However, the law does not contemplate the payment of increased allowances to both members on account of the same dependent. 51 Comp. Gen. 413 (1972). Therefore, only one of the members may claim the child as a dependent for increased allowance purposes.

Paragraph 30236a of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) deals with cases involving members who were married to each other but are subsequently divorced and have dependents of the marriage. These provisions generally provide that a member paying child support to the member with custody of the child is entitled to the increased allowance if the child support payments are equal to or greater than the difference in that member's with and without dependent rate of BAQ. The member with custody of the child can only claim the increased BAQ on account of the child if the other member declines to claim the child as a dependent for BAQ purposes. Further, the member receiving the increased allowance on account of the child loses entitlement if he remarries and is assigned to Government family quarters or the child is housed in Government quarters. See 58 Comp. Gen. 100 (1978) and paragraph 30237, DODPM.

At the outset, we would like to point out that Ms. Bedford's marriage to Sergeant Bedford has no bearing on this case unless they are assigned family-type Government quarters, in which case neither would be entitled to BAQ. Ms. Bedford indicates that her former husband will not decline to claim their dependent for BAQ purposes, even though he is entitled to the increased allowance on account of another dependent, his wife. Ordinarily, the dependent for whom he is paying child support would be considered part of the class of his dependents, the child and his new wife, and thus the child could not be claimed for BAQ purposes by Ms. Bedford.

In our decision 52 Comp. Gen. 602 (1973), we allowed payment of the increased allowance to a female member who had custody of a child of a former marriage to another member even though the other member was paying child support. The

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decision noted that the female member contributed more than half of the child's support as was then required by 37 U.S.C. 401 (1970) for female members to claim dependents. This, together with the fact that the male member was entitled to an increased allowance on account of other dependents independently of that marriage, was the reason, for the conclusion. We followed this rule referring only to substantial support (not including child support payments) in decision B-189973, February 8, 1979, after the dependency criteria applicable only to female members was removed by Public Law 96-64, July 9, 1973, 87 Stat. 148, resulting from the United States Supreme Court's decision in Frontiero v. Richardson, 411 U.S. 677 (1973), declaring such requirement unconstitutional.

Thus, while it is no longer necessary for a female member to show that she contributes over one-half the support of a child to claim it as a dependent, it is our view that the relative costs of the respective members concerned (male and female) in supporting the child provide an equitable indicator for the purposes of determining which of the members is entitled to the increased allowances authorized in chapter 7, of title 37, even though the specific allowance involved is quarters allowance. Accordingly, it is our view that Ms. Bedford may receive BAQ at the with dependent rate on account of the dependent child if she meets the substantial support criteria, since the child is also her dependent under 37 U.S.C. 401, and it is unnecessary for Mr. Butts to claim the child in order to continue receiving BAQ at the with dependent rate based on his wife as a dependent.

Question "b" involves whether a member in the circumstances presented must decline to claim the dependent in order for the member with custody to receive the increased allowance. While two members may not receive increased allowance on the basis of the same dependent (51 Comp. Gen. 413 (1972)), it is our view that when there is no need on the part of the member paying child support to claim the dependent in order to receive the increased allowance the member having custody should receive the increased allowance if that member is furnishing the substantial support to the dependent. Thus the answer to the question is no.

Question "c" relates to the form to be used if the

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member declines to claim the dependent for increased BAQ and whether such a declination is irrevocable. For accounting purposes, it is obviously preferred that a member who is not claiming a dependent provide such information in writing. However, as we noted in the answer to question "b" it is our position that a member's formal declination to claim a dependent is not necessary where the facts indicate that the other member is entitled to claim the dependent, particularly in circumstances such as the instant case where one of the members will not make a declination. Accordingly, we do not believe any particular format is necessary, although a written declination would be preferable.

In addition, we do not see any advantage to having the member's commanding officer endorse the declination if a written one is provided, nor do we believe a declination should be considered or required to be irrevocable. Since it is possible that a member's dependents may change a member's ability to reclaim a dependent should also be flexible depending on circumstances. This question is answered accordingly.

The voucher is returned herewith and may be certified for payment if Ms. Bedford demonstrates she contributes substantially to the support of the child.



Acting Comptroller General
of the United States